

IN THE
SUPREME COURT OF MISSOURI

No. SC84092

STATE OF MISSOURI, ex rel. SSM HEALTH CARE ST. LOUIS,

Relator,

v.

MARGARET M. NEILL, Circuit Court Judge,

Twenty-Second Judicial Circuit, Missouri,

Respondent

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent concurs with the jurisdictional Statement of Relator and admits that jurisdiction of this Court is proper.

STATEMENT OF FACTS

Plaintiff Noah D. Thompson filed this medical malpractice action on May 23, 2001 against defendants Nanci J. Bucy, D.O. and relator SSM Healthcare St. Louis (hereinafter “relator SSM”) for injuries suffered by plaintiff as the result of defendants’ negligence during his delivery. See Exhibit 1.¹ Relator SSM is a Missouri not-for-profit corporation with its principal place of business in St. Louis County and an office for the transaction of its usual and customary business at 6555 Chippewa in the City of St. Louis. See Exhibit 5 and exhibits attached thereto. The fact that relator SSM maintains an office for the transaction of its “usual and customary business” in the City of St. Louis remains *uncontested*. See Exhibits 2, 3, 4, and 6 and Brief.

On June 28, 2001, relator SSM filed its Motion to Transfer Venue and supporting Legal Memorandum. Exhibits 2 and 3. On July 5, 2001, plaintiff Noah Thompson filed his Reply to the Motion to Transfer Venue. Exhibit 5. On August 6, 2001, relator SSM filed its Reply to plaintiff’s Reply to the Motion to Transfer Venue. Exhibit 6. Thereafter, on August 7, 2001, plaintiff filed his Response to the Reply of relator SSM. Exhibit 7. On August 8, 2001, respondent issued an Order denying relator SSM’s Motion to Transfer Venue. Exhibit 8.

Thereafter, on August 21, 2001, relator SSM filed its Petition for Writ of Prohibition or, in the Alternative, Writ of Mandamus, in Missouri Court of Appeals, Eastern District. On November 7, 2001, the Eastern District denied said petition. Exhibit 9.

¹Unless stated otherwise, all citations to exhibits herein are references to those exhibits attached to the Opening Brief of Relator and included in the Appendix attached thereto.

On November 26, 2001, relator SSM filed with this Court its Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus and Suggestions in Support. On January 15, 2002, respondent herein filed her Answer & Return to Preliminary Writ of Prohibition. Based upon said petition, three issues now confront this Court: (1) which statute shall this Court apply to determine venue where a plaintiff joins as defendants a nonprofit corporation and an individual in the same suit?; (2) should this Court hold that Section 508.010 apply under such circumstance, what criteria establishes the residence of a nonprofit corporation under Section 508.010(2)?; and (3) under application of Section 508.010(2), may the residence of a nonprofit corporation establish venue independent of a codefendant residing in the county in which plaintiff brought suit?

POINTS RELIED ON

- I. **Relator is not entitled to an Order commanding Respondent to transfer this cause from the Circuit Court of the City of St. Louis because venue remains proper in the City of St. Louis in that Section 508.010(2), not Section 355.176(4), governs as the applicable venue statute because in his Petition Plaintiff joined as party defendants a nonprofit corporation with an individual defendant and evidence in the record indicates that Relator is a resident of the City of St. Louis.**

State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo.banc 1998)

State ex rel. Steinhorn v. Forder, 792 S.W.2d 51 (Mo.App.E.D. 1990)

Section 508.010(2) R.S.Mo. (2000)

II. Relator is not entitled to an Order commanding Respondent to transfer this cause from the Circuit Court of the City of St. Louis because venue remains proper in the City of St. Louis in that under application of Section 508.010(2), Relator, a nonprofit corporation which maintains an office and agents in the City of St. Louis, is a resident of St. Louis City.

State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo.banc 1939)

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State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo.banc 1963)

Section 351.690(3) R.S.Mo. (2000)

Section 351.161 R.S.Mo. (2000)

III. **Relator is not entitled to an Order commanding Respondent to transfer this cause from the Circuit Court of the City of St. Louis because venue remains proper in the City of St. Louis in that should this Court find Relator to be a resident of the City of St. Louis, venue remains proper whether or not any other party defendant resides in the Circuit.**

State ex rel. Malone v. Mummert, 889 S.W.2d 823 (Mo.banc 1994)

State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo.banc 1998)

State ex rel. Webb v. Satz, 561 S.W.2d 113 (Mo.banc 1978)

Section 508.010(2) R.S.Mo. (2000)

ARGUMENT

The party asserting improper venue possesses the burden of persuasion and proof. Coale v. Grady Bros. Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo.App.S.D. 1993). In its motion before the trial court and the pending petition, relator SSM failed to present any evidence demonstrating that relator did not maintain an office or agent for the transaction of its “usual and customary business” in the City of St. Louis on the date plaintiff filed suit, May 23, 2001. Therefore, relator SSM has failed in its burden of proof on the issue of whether relator is a resident of the City of St. Louis. Because venue should be determined under Section 508.010 when plaintiff joins as defendants a nonprofit corporation and an individual and because relator SSM is a resident of the City of St. Louis, venue remains proper in the Circuit Court of the City of St. Louis.

- I. **Relator is not entitled to an Order commanding Respondent to transfer this cause from the Circuit Court of the City of St. Louis because venue remains proper in the City of St. Louis in that Section 508.010(2), not Section 355.176(4), governs as the applicable venue statute because in his Petition Plaintiff joined as party defendants a nonprofit corporation with an individual defendant and evidence in the record indicates that Relator is a resident of the City of St. Louis.**

In its Brief, relator SSM contends that Section 355.176(4) requires the transfer of the pending case from the Circuit Court of the City of St. Louis to either St. Louis County or St. Charles County. Brief at 23. Section 355.176(4) provides:

“Suits against a nonprofit corporation shall be commenced only in one of the following locations:

- (1) The county in which the nonprofit corporation maintains its principal place of business;
- (2) The county where the cause of action accrued;
- (3) The county in which the office of the registered agent for the nonprofit corporation is maintained.”

Section 355.176(4) R.S.Mo. (2000).² According to relator, the “special” nature and “mandatory” language contained in the statute require its application in the pending case. *Id.* at 22-27. Such reliance on Section 355.176(4) to establish venue in St. Louis County or St. Charles County is misplaced.

Contrary to the assertion of relator SSM, this Court should hold that Section 355.176(4) applies only when its subject -- a nonprofit corporation -- is the *sole* defendant. Rather, this Court should hold that Section 508.010(2) governs the determination of venue when plaintiff commences suit against multiple defendants, including nonprofit corporations and individuals, all of whom are residents of Missouri and one or more of which are nonprofit corporations. Though plaintiff has found no Supreme Court case construing *in pari materia* Section 355.176(4) and Section 508.010, this Court recently noted that:

²L.1996, S.B. No. 768, Section A repealed Section 355.176(4). However, in 1998, this Court held L.1996, S.B. No. 768 to be unconstitutional. See St. Louis Health Care Network v. State of Missouri, 968 S.W.2d 145 (Mo.banc 1998).

“When individuals and corporations are sued in the same suit, section 508.010(2) governs: ‘When there are several defendants, and they reside in different counties, the suit may be brought in any such county.’”

State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo. banc 1998); See also Section 508.010(2) R.S.Mo. (2000). In Smith, this Court found venue to be proper in a Jackson County, a residence of Shelter Mutual Insurance Company, an insurance corporation. Id. at 191, 193. Not defined by statute, the residence of an insurance corporation under section 508.010(2) is *any* county in which the corporate defendant has or usually keeps an office or agent for the transaction of its usual and customary business. Id. at 193.

In fact, Smith is one in a long line of cases in which this Court recognized the proposition that the trial court should apply the general venue statute to determine venue when plaintiff joins as defendants a corporation and an individual. See also State ex. rel. O’Keefe v. Brown, 235 S.W.2d 304 (Mo.banc 1951); State ex rel. Whiteman v. James, 265 S.W.2d 298 (Mo. banc 1954); State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo.banc 1962); State ex rel. Dick Proctor Imports, Inc. v. Gaertner, 671 S.W.2d 273 (Mo.banc 1984); State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo.banc 1994).

The Missouri Court of Appeals, Eastern District, has recognized that the general venue statute governs the determination of venue when plaintiff joins as party defendants an individual and a nonprofit corporation. See State ex rel. Steinhorn v. Forder, 792 S.W.2d 51, 52 (Mo.App.E.D. 1990). In that case, the Eastern District entertained a proceeding in prohibition after the trial court denied defendants’ motions to dismiss for improper venue on the basis that defendants had engaged in discovery on the

merits following the timely filing of pleadings objecting to venue. Id. at 52-53. Importantly, the Eastern District acknowledged that Section 508.010 fixed venue in any county in which any defendant resides or, in a tort case, the county in which cause accrued, where plaintiff sued both an individual and a nonprofit corporation. Id. at 53. There, the Court found venue to be proper in the county in which the nonprofit corporate defendant, Washington University, resided. Id.³

Nevertheless, relator SSM asserts that because Section 355.176 is a “special venue statute,” it must prevail over the general venue statute, Section 508.010. In support, relator relies on two cases which examine the municipal corporation venue statute and the county venue statute where the respective plaintiffs joined an individual with a governmental entity. See Brief at 25-26; See also State ex rel. City of St. Louis v. Kinder, 698 S.W.2d 4 (Mo.banc 1985); State ex rel. City of Bella Villa v. Nicholls, 698 S.W.2d 44 (Mo.App.E.D. 1985). For the reasons put forth below, both cases are distinguishable to the issue at hand.

In Bella Vista, the Eastern District considered whether the municipal corporation venue statute, Section 508.050, governed when plaintiff joined a municipal corporation with an individual defendant. Bella Villa, 698 S.W.2d at 44-45. In that case, the Court held that Section 508.050 prevailed over the

³Respondent notes that at the time of the Steinhorn opinion, Section 355.170 R.S.Mo. (1986) provided the residence of a nonprofit corporation “shall be deemed for all purposes to be in the county where its registered office is maintained.” In 1990, the General Assembly repealed Section 355.170 and enacted Section 355.161 in its place. See Section 355.161 R.S.Mo. (2000). Section 355.161 makes no provision regarding the residence of a nonprofit corporation. See Point II below.

general venue statute because of language in that provision directing:

“[s]uits against municipal corporations as defendant or *codefendant* shall be commenced *only* in the county in which the municipal corporation is situated.”

See Id. at 45 (emphasis in original); See Section 508.050 R.S.Mo. (2000). In City of St. Louis, this Court held that Section 508.060 required an action brought against both the City of St. Louis and the Missouri Director of Revenue to be commenced in the Circuit Court of the City of St. Louis. In pertinent part, Section 508.060 provides:

“*All actions whatsoever* against any county shall be commenced in the circuit court of such county, and prosecuted to final judgment and execution therein . . .
”

Section 508.060 R.S.Mo. (2000) (emphasis added).

However, unlike Section 508.050 and Section 508.060, the nonprofit venue statute contains no language directing its application either: (a) in suits involving both nonprofit corporations **and** other entities or (b) in **all** actions involving nonprofit corporations. See Section 355.176(4). Should the General Assembly intended for Section 355.176 to apply where plaintiff joined as defendants an individual and a nonprofit corporation, the legislature would have included the “codefendant” language appearing in Section 508.050. Likewise, the legislature would have incorporated words directing that “all actions whatsoever” against nonprofit corporations be instituted in a particular venue had the General Assembly intended for Section 355.176 to apply in each and every suit involving a nonprofit corporation. Section 355.176 contains no such language. The statute merely reads: “Suits against a nonprofit corporation shall be commenced. . .” See Section 355.176. Therefore, contrary to the

assertion of relator, Section 355.176(4) does not prevail over Section 508.010 merely because Section 355.176(4) is a “special” venue statute.

Additionally, relator SSM contends that this Court should apply Section 355.176 here because the language of Section 355.176(4) “is clearly mandatory and exclusive.” Referencing Section 355.176(4), relator suggests that “suits against a nonprofit corporation **shall** be commenced **only**” in any one of the three locations specified by the statute. Brief at 26. Such assertion, however, ignores the numerous cases decided by this Court and cited above which apply the general venue statute where plaintiffs joined as defendants an individual and a corporation. Such cases applied Section 508.010 despite language contained in Section 508.040, providing in pertinent part:

“Suits against corporations *shall* be commenced either in the county where the cause of action accrued, . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.”

Section 508.040 R.S.Mo. (2000) (emphasis added). Much like Section 355.176(4), Section 508.040 provides that “[s]uits against corporations shall be commenced” in any one of multiple venues specifically enumerated by the statute. Like 508.040, Section 355.176(4) should be held by this Court to submit to Section 508.010 when a nonprofit corporation is joined with an individual defendant. Afterall, pursuant to O’Keefe and its progeny, the general venue statute applies regardless of the fact that the corporate venue statute is a “special” venue statute containing “mandatory” language.

Much like the “special” corporation venue statute, Section 355.176(4) is a “special” venue

statute, to be utilized merely in a specific situation.⁴ Similar to its construction of Section 508.040, this Court should construe Section 355.176(4) to apply only when the sole defendant or all defendants are nonprofit corporations. Because plaintiff here joined relator SSM with an individual defendant, Section 508.010 -- and not Section 355.176(4) -- applies to the pending case. As such, this Court should determine venue based upon the residence of relator SSM and defendant Bucy on the date plaintiff filed the pending case.

II. Relator is not entitled to an Order commanding Respondent to transfer this cause from the Circuit Court of the City of St. Louis because venue remains

⁴As an aside, respondent directs the Court to the opinion of the Missouri Court of Appeals, Eastern District, in the case of State ex rel. Vaughn v. Koehr, 835 S.W.2d 543 (Mo.App.E.D. 1992). In Vaughn, the Eastern District held that for venue purposes, a nonprofit corporation shall be treated as a general business corporation when joined as a defendant with such corporations. Id. at 544. In that case, the Court applied Section 508.040 rather than Section 355.176(4) to determine venue though plaintiff joined a nonprofit corporation with a general business corporation. Id.

proper in the City of St. Louis in that under application of Section 508.010(2),
Relator, a nonprofit corporation which maintains an office and agents in the
City of St. Louis, is a resident of St. Louis City.

The central issue for the consideration of this Court is the residence of a nonprofit corporation under application of the general venue statute, Section 508.010(2).⁵ In pertinent part Section 508.010(2) provides:

“Suits instituted by summons shall, except as otherwise provided by law, be brought:

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;”

Section 508.010(2) R.S.Mo. (2000). Under Section 508.010(2), the court looks to the residence of the defendants to determine the propriety of venue. Smith, 979 S.W.2d at 191. In the absence of a specific statute, this Court should find the residence of a nonprofit corporation to be any county in which a nonprofit corporation maintains an office or agent from the transaction of its usual business. See Id. at 192-193.

Prior to 1943, no Missouri statute defined the “residence” of corporations for venue purposes. Smith, 979 S.W.2d at 192. Prior to that date, the Supreme Court applied the common law rule that a corporation’s “residence may be wherever its corporate business is done.” Id.

⁵For the sake of brevity and clarity, respondent has replied to Points II and III put forth in the Brief of Relator under this Point Relied On, numbered II.

In State ex rel. Henning v. Williams, this Court held a corporate defendant to be a resident of any county where the corporation maintained an office or agent for the transaction of its “usual and customary business.” Henning, 131 S.W.2d 561, 563-64 (Mo.banc 1939); see Smith, 979 S.W.2d at 192. In reaching its holding, this Court in Henning acknowledged the general rule, instructing:

“ . . . if there are no statutes in this state fixing the venue of suits against foreign corporations, the Shell Company [the corporate defendant] can be sued in any county in the state, or at least in any county where it has an agent upon whom process may be served, and relator would have no ground for complaint on that score.”

Id. at 563.

In 1943, the General Assembly changed the law when the legislature adopted The General and Business Corporation Act of Missouri. 1943 Mo.Laws 410, 414. In the Act, the Assembly legislated the residence of a general business corporation “shall be deemed for all purposes to be in the county where its registered office is maintained.” See Id.; Section 351.375(4) R.S.Mo. (1959); Section 351.375(2) R.S.Mo. (2000); Smith, 979 S.W.2d at 192. The legislature incorporated such language in Section 351.375.⁶

Following the adoption of the Act by the legislature, the Supreme Court interpreted Section 351.375(4) to establish the residence of a Missouri corporation under Section 508.010(2) when

⁶ As it does today, Section 351.375 permitted a Missouri corporation to change both its registered agent and the location of its registered office and specified the manner in which a domestic corporation may accomplish such changes. See Section 351.375.

plaintiff joined the corporation with an individual. See O’Keefe, 235 S.W.2d at 306. Subsequently, the Court interpreted the statute to provide for the exclusive residence of a corporate defendant for venue purposes when plaintiff joined a corporate defendant with an individual. See Whiteman, 265 S.W.2d at 299-300; Bowden, 359 S.W.2d at 350-351.

Note, however, that Chapter 351 *does not apply* to nonprofit corporations. Section 351.015(6) defines “corporation” as used in Chapter 351 as: “corporations organized under this chapter or subject to some or all of the provisions of the chapter” See Section 351.015(6) R.S.Mo. (2000). Furthermore, Section 351.690(3) provides: “No provisions of this chapter . . . shall be applicable to . . . nonprofit corporations.” See Section 351.690(3) R.S.Mo. (2000). Nonprofit corporations, such as relator SSM organize under Chapter 355. See Section 355.020 R.S.Mo. (2000).

Prior to 1994, Chapter 355 contained a provision similar to Section 351.375(2). Section 355.170.1(2) provided:

“The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.”

See Section 355.170 R.S.Mo. (1986). In 1994, the General Assembly repealed Section 355.170.1(2) and enacted Section 355.161 in its place. See Section 355.161 R.S.Mo. (2000). Section 355.161 makes no provision regarding the residence of a nonprofit corporation. Thus, no statute now speaks to the residence of a nonprofit corporation.

In the absence of a specific statute, a corporate defendant is a resident of any county where it maintains an office or agent for the transaction of its “usual and customary business.” Henning, 131

S.W.2d at 563-64; State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 200-01 (Mo.banc 1991); Smith, 979 S.W.2d at 192-193. In the proceedings below, Judge Lawrence Mooney recognized:

“ . . . Our ultimate goal is to divine the legislature’s intent on the difficult questions of venue. To do so, we need to harmonize all the actions of the legislature, including its repeal of the non-profit corporation’s residence statute. The dissent advances the theory that the legislature’s repeal of this explicit residence statute is meaningless because the legislature sought to reestablish a non-profit corporations’s residence by implication of the registered office statute. It is difficult to conceive why the legislature would repeal an explicit statute, yet seek to void its repeal by mere implication. . . .”

Exhibit 9 at 3.

Indeed, in Rothermich, this Court recognized a “distinction between a business corporation whose residence was defined by statute and an insurance corporation whose residence was not.” Id. at 198. In that case, plaintiff brought suit against an individual and a foreign insurance company. Id. at 195-196. There, this Court concluded that in the absence of a statute defining residence, a foreign insurance corporation resides in any county where the corporation maintains an office for the transaction of its regular business. Id. at 201. In coming to that conclusion, this Court acknowledged: (a) the absence of any statute defining “residence” of a foreign insurance corporation; (b) the distinction between corporate entities whose residence was defined by statute and those whose residence was not; and (c) the long-followed rule fixing residence of a corporate entity in the absence of a statute in any county where the corporation maintains an office for the transaction of its business. Id. at 198-201; See

also State ex rel. Stamm v. Mayfield, 340S.W.2d 631, 634-635 (Mo.banc 1960).

Not defined by statute, the residence of a nonprofit corporation is any county where it maintains an office or agent for the transaction of its “usual and customary business.” Much like an insurance corporation, no statute defines “residence” of a nonprofit corporation. Absent such a statute, a nonprofit corporation, like an insurance corporation -- and a general business corporation prior to passage of The General and Business Corporation Act in 1943, is a resident of any county where the corporation maintains an office for the transaction of its business. In the proceedings below, plaintiff presented evidence that relator SSM operates an office for the conduct of its health care business in the City of St. Louis. Exhibit 5. Such evidence remains uncontroverted. Maintaining an office and agents in the City of St. Louis, relator SSM is a resident of the City of St. Louis.

Here, however, relator SSM asserts that its residence -- and the residence of any nonprofit corporation joined with an individual defendant -- should be the location of the nonprofit corporation’s registered agent and registered office or, alternatively, the location of its principal place of business. See Brief at 27-28, 34. In support, relator SSM contends that provisions contained in Chapter 355 requiring nonprofit corporations doing business in Missouri to maintain a registered agent and registered office in this State establish, by implication, the location of such agent and office as the nonprofit corporation’s residence. Relator SSM, and the dissent below, found their contention on an opinion of this Court expanding application of the predecessor to Section 351.075(2) to define the residence of foreign, as well as domestic, corporations.⁷ See Bowden, 359 S.W.2d at 343.

⁷ The Bowden Court examined Section 351.375(4) R.S.Mo. (1959), a predecessor to Section 351.375(2) R.S.Mo. (2000). Like Section 351.375(2) today, the closing sentence of Section

In Bowden, this Court held that a foreign corporation, like a Missouri corporation, exclusively “resides” in the county in which the foreign corporation maintains its registered agent. Id. at 349-351. The Bowden Court founded its holding on language referencing Section 351.375(4) in a statute mandating the manner in which a foreign corporation may change its registered office and agent. Though the provision relating to the changing of the registered office and agent of a foreign corporation contained no such language, the provision did provide as follows:

“A foreign corporation may from time to time change the address of its registered office. A foreign corporation shall change its registered agent if the office of registered agent shall become vacant for any reason, or its registered agent becomes disqualified or incapacitated to act, or if it revokes the appointment of its registered agent. *Any such change either in the registered office or in the registered agent shall be made in the manner as prescribed in section 351.375.*”

Section 351.625 R.S.Mo. (1959) (emphasis added).

Contrary to the claim of relator SSM, this Court based its holding not on the statutory scheme requiring foreign corporations operating in Missouri to maintain a registered office, but rather on language contained in Section 351.625 referencing Section 351.375(4). In considering the question of the residence of a foreign corporation, the Court found the last sentence of Section 351.625 to

351.375(4) directed, in pertinent part:

“The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.”

incorporate by reference Section 351.375(4). Therefore, this Court reasoned, Section 351.375(4) fixed the residence of foreign corporations registered to do business in this State by virtue of language contained in Section 351.625 referencing a provision directing the manner in which Missouri corporations may change the location of their registered office and registered agent. Bowden, 359 S.W.2d at 344, 350-351. Thus, the Bowden Court found the corporate defendant, a Delaware corporation, to be a resident of the City of St. Louis, the location of its registered agent. Id. The Court stated:

“We think the only legally sound, practical and satisfactory construction to placed upon Sec. 508.010, subd. 2 when considered together with Sec. 351.625 is to hold, as we must and do, that a foreign business corporation “resides” in the county where its registered office and registered agent is located under Sec. 351.620. This conclusion. . . is consistent with the statute applicable to *domestic* corporations, Sec. 351.375, including the closing sentence thereof, and is also consistent with the conclusion reached by this court in *State ex rel. O’Keefe v. Brown*, *supra*, construing Sec. 351.375.”

Id. (emphasis in original).

Relator SSM’s reliance on the rationale of the Bowden Court is misplaced for two reasons: (1) Chapter 355 contains no language, either direct or indirect, defining the residence of a nonprofit corporation and (2) the General Assembly repealed the foundation of this Court’s opinion in Bowden – language contained in the last sentence of Section 351.625 referencing Section 351.375. Unlike domestic corporations or foreign corporations operating in Missouri in 1962, no statute currently

defines the residence of a nonprofit corporation. As stated above, the General Assembly repealed in 1994 a statute which defined the residence of a nonprofit corporation and enacted in its place a statute which makes no provision regarding the residence of a nonprofit corporation. See Section 355.161.

Additionally, the fact that nonprofit corporations, like domestic and foreign corporations, must maintain a registered office and registered agent in this State remains immaterial. In Henning, this Court seemingly considered -- and chose not to adopt -- such an argument. See Henning, 131S.W.2d at 563. In addition, an essential difference exists between Chapters 351 and 355: Chapter 351 contains language key to any determination of residence of a corporation organized under that chapter. Chapter 351, unlike Chapter 355, contains a provision establishing “residence” of a domestic business corporation -- Section 351.375(2). In its Petition for Writ, relator SSM seemingly concedes that Chapter 355 does not contain such language. In its Suggestions attached thereto, relator admits:

“Unlike Chapter 351, which provides that a corporation is a resident of the county where its registered office is maintained (§351.375.2), Chapter 355 does not explicitly provide that a not for profit corporation is a resident of the county where it maintains its registered agent and office.”

Petition for Writ/Suggestions at 10. Indeed, as admitted by relator, no such language exists in Chapter 355. Finally, contrary to the claim of relator SSM, the Bowden Court based its holding not on the registered office and agent requirement but on *explicit* language in a provision dealing with foreign corporations which referenced the “for all purposes” language of Section 351.375. Bowden, 359 S.W.2d at 350-351.

Furthermore, in 1990, the General Assembly repealed Section 351.625 -- the basis for the

analogy made by this Court in Bowden and the foundation of relator's argument. In 1990, the legislature repealed Section 351.625 and enacted Section 351.588 in its place. See Section 351.588 R.S.Mo. (2000). Section 351.588 contains no language defining the residence of a foreign corporation or referencing Section 351.375. Id. Thus, when the General Assembly enacted Section 351.588 in 1990, the legislature not only repealed Section 351.625 and its reference to Section 351.375, but it enacted a provision without any language establishing the residence of a foreign corporation to be "for all purposes" the county in which it maintains its registered office. See Section 351.588. Today, no language exists incorporating by reference Section 351.375 into the statutory provisions concerning foreign corporations. Under such circumstance, the question exists whether the Bowden Court would have held differently if posed with the question today.

In a footnote, relator SSM cites to this Court two cases decided by the Eastern District prior to repeal of Section 355.170 in support of its contention that this Court should establish residence of a nonprofit corporation joined with an individual as the county in which the corporation maintains its registered office. See Brief at 31; See also Steinhorn, 792 S.W.2d at 53; Vaughn, 835 S.W.2d at 543. Such reliance is mislaid. First, the Eastern District decided Vaughn in the context of Section 508.040. Furthermore, at the time of both the Steinhorn and Vaughn opinions, Section 355.170.1(2) was still valid law and provided for the residence of a nonprofit corporation. As stated above, the General Assembly repealed Section 355.170.1(2) in 1994 and, as a result, there is no longer any statutory guidance as to where the residence of a nonprofit corporation should be located.

Finally, the contention of relator SSM that this Court must look to Section 355.176 to define the residence of a nonprofit corporation must fail. Such argument misconstrues the reasoning of this

Court in Henning and Rothermich and ignores the general rule that absent statutory direction, the residence of a corporation – any corporation – is any county in which the corporation conducts its business. See Henning, 131 S.W.2d at 563; Smith, 979 S.W.2d at 192. In the pending case, relator SSM does not dispute that relator conducts its healthcare business in the City of St. Louis.

Nevertheless, relator SSM has petitioned this Court in the pending action in an attempt to avoid the courts in this Circuit. This Court should not permit relator SSM – and other corporations transacting business in a particular venue – to avoid suit in such locale.

Therefore, this Court should look to Henning and the common law of corporate residence to delineate the residence of a nonprofit corporation joined with an individual defendant under Section 508.010. As stated above, Henning directs that absent statutory guidance the residence of a corporation shall be any county where the corporation maintains an office for the transaction of its usual and customary business. Today, no statute defines the “residence” of a nonprofit corporation. Thus, in the absence of statutory guidance, this Court should hold here that under Section 508.010(2) a nonprofit corporation is a resident of any county in which the corporation maintains an office or agent for the transaction of its usual and customary business. Much like the rule enunciated by this Court in Rothermich and Smith, such a holding would prove desirable in that the rule would provide definiteness and certainty, thereby discouraging litigation related to venue issues. See Rothermich, 816 S.W.2d at 200-201; Smith, 979 S.W.2d at 193.

In this case, relator SSM is a nonprofit corporation. Here, plaintiff joined relator SSM with an individual defendant, defendant Bucy. Because relator SSM maintains an office for the transaction of its usual and customary business in the City of St. Louis, a fact which remains *uncontested* by relator,

relator SSM is a resident of the City of St. Louis. Because relator SSM is a resident of the City of St. Louis, venue remains proper in the Circuit Court of the City of Louis.

III. Relator is not entitled to an Order commanding Respondent to transfer this cause from the Circuit Court of the City of St. Louis because venue remains proper in the City of St. Louis in that should this Court find Relator to be a resident of the City of St. Louis venue remains proper whether or not any other party defendant resides in the Circuit.

In its final point, relator SSM seemingly prays this Court fashion a rule directing that under Section 508.010(2), venue is proper in a suit involving a nonprofit corporation and an individual defendant only where plaintiff demonstrates that a fellow defendant is a resident of or that the cause accrued in the county in which plaintiff brought suit, irrespective of the residence of the nonprofit corporation. Brief at 40. Relator cites no cases in support of said contention.

Section 508.010 directs that venue shall be proper in a suit against multiple resident defendants in any county of which *any one of those defendants* is a resident. In pertinent part, Section 508.010(2) directs:

“Suits instituted by summons shall, except as otherwise provided by law, be brought:

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;”

See Section 508.010(2). Thus, where plaintiff commences suit against multiple defendants, each a resident of Missouri which reside in different counties in this State, venue is proper in any county in

which any of those defendants resides. Smith, 979 S.W.2d at 191; State ex rel. Malone v. Mummert, 889 S.W.2d 823, 824 (Mo.banc 1994); See also State ex. rel. Parks v. Corcoran, 625 S.W.2d 686, 687-688 (Mo.App.E.D. 1981). In Malone, this Court held venue to be proper in the City of St. Louis, the residence of one of multiple defendants. Id. at 826. There, plaintiff brought suit against four defendants: two business corporations and two individuals. Neither of the individual defendants resided in St. Louis City. Nevertheless, this Court found venue to be proper in the City of St. Louis, the residence of only one of the four defendants -- one of the corporate defendants. Id. at 824-826.

Adoption of the rule proposed by relator SSM in its Brief would fly in the face of long-followed principles of law administered by the courts of this State. As shown above, the unequivocal language of the general venue statute mandates that “[w]hen there are several defendants” which “reside in different counties, the suit may be brought in any such county.” See Section 508.010(2). In applying the general venue statute, this Court has held in case after case that when plaintiff brings suit against multiple resident defendants, venue shall be proper in any county in which any one of the defendants reside. See Smith, 979 S.W.2d at 191; Malone, 889 S.W.2d at 824; O’Keefe, 235 S.W.2d at 305, 307; Henning, 131 S.W.2d at 562, 565.⁸ Missouri courts have long recognized the consistent policy of the General Assembly to broadly subject corporations to suit. See State ex rel. Webb v. Satz, 561 S.W.2d 113, 114 (Mo.banc 1978). In sum, adoption of the rule relator proposed would serve only to confuse,

⁸The cases cited herein are but a few of many cases in which this Court has applied Section 508.010(2), recognizing venue to be proper in any county in which any one of multiple defendants resides.

complicate, and contort operation of the general venue statute by both parties and the courts of this State.

Finally, relator SSM mischaracterizes the finding of respondent in her Order of August 8, 2001. In said Order, respondent found that plaintiff had presented evidence that relator SSM operates an office for the conduct of its health care business in the City of St. Louis and, to that extent, venue is proper. Exhibit 8 at 4; See also Exhibit 5. Respondent did not find that “SSM might have an office or agent for the transaction of its usual and customary business in the City of St. Louis.” See Brief at 42. In truth, the record remains devoid of any evidence contradicting that presented by plaintiff below indicating the conduct of business in St. Louis City. See Exhibits 2, 3, 4, and 6. The fact that relator SSM maintains an office for the transaction of its “usual and customary business” in the City of St. Louis remains *uncontested* by relator SSM. See id. and Brief. As such, for the reasons put forth above, relator SSM is a resident of the City of St. Louis and venue remains proper in the Circuit Court of the City of St. Louis.

CONCLUSION

WHEREFORE, for the reasons set forth herein, respondent Margaret M. Neill, Circuit Court Judge, 22nd Judicial Circuit, respectfully requests that this Court make and enter its Order quashing its Preliminary Order in Prohibition and remanding this cause to the Circuit Court of the City of St. Louis for reinstatement and further proceedings.

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE

84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 7,010 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Brief of Respondent is electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and its virus-free.

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CERTIFICATE OF SERVICE

A true copy of the foregoing has been served upon all parties by depositing the same in the

United States mail, postage pre-paid, this 6th day of March, 2002, addressed to the attorneys of record herein, Mr. Robert J. Foley, Attorney for Defendant Nanci J. Bucy, D.O., 515 Olive Street, Suite 1700, St. Louis, Missouri 63101, Mr. Edward M. Goldenhersh and Ms. Jennifer E. Alexander, Attorneys for Defendant SSM Health Care St. Louis, 10 S. Broadway, Suite 2000, St. Louis, Missouri 63102, and Mr. Paul E. Kovacs and Mr. Timothy Gearin, Attorneys for Defendant SSM Health Care St. Louis, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102-2740.

CC: Margaret M. Neill, Circuit Court Judge